UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NATIONAL TPS ALLIANCE, et al.,

Plaintiffs,

v.

KRISTI NOEM, et al.,

Defendants.

Case No. 25-cv-01766-EMC

ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE

Docket No. 187

The government seeks relief from a discovery order issued by Judge Kim on June 6, 2025. *See* Docket No. 184 (order). Pursuant to 28 U.S.C. § 636, this Court reviews Judge Kim's discovery order for clear error or a ruling contrary to law. *See* 28 U.S.C. § 636(b)(1)(A) (providing that "[a] judge may designate a magistrate to hear and determine any pretrial matter pending before the court [with limited exceptions]" and that a judge "may reconsider any pretrial matter . . . where it has been shows that the magistrate judge's order is clearly erroneous or contrary to law"); *see also* Fed. R. Civ. P. 72(a); *Grimes v. City & Cnty. of S.F.*, 951 F.2d 236, 241 (9th Cir. 1991). In reviewing for clear error, a district judge may not simply substitute his or her judgment for that of the magistrate judge. *See id.* Rather, a magistrate judge's non-dispositive ruling is clearly erroneous only when a district judge is left with a "definite and firm conviction that a mistake has been committed." *Burdick v. Comm'r Internal Rev. Serv.*, 979 F.2d 1369, 1370 (9th Cir. 1992).

Here, the government's motion for relief is **DENIED**. Judge Kim invoked the appropriate legal framework in conducting her analysis of the deliberative process privilege ("DPP"), and her application of the framework to the bellwether documents was well reasoned and supported by the

record. Upon this Court's review, the Court finds no clear error or ruling contrary to law.

I. DISCUSSION

In its motion, the government does not contend that Judge Kim committed any error with respect to her identification of the applicable legal test for the DPP. Nor does the government identify any document within the bellwether set where Judge Kim clearly erred.[1] Instead, the government asserts five specific errors by Judge Kim.

First, the government suggests that Judge Kim erred by failing to do a document-by-document analysis of the documents over which it claimed the deliberative process privilege ("DPP"). However, the government never made such a request of Judge Kim. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) ("*If* Defendants persuasively argue that a more granular analysis would be proper, the district court should undertake it.") (emphasis added). Nor did the government assert to Judge Kim that a bellwether or sampling approach was improper. In fact, a declaration submitted by the government indicates otherwise. *See* Docket No. 177-4 (Law Decl. ¶ 4) ("It is my understanding that this subset of documents is representative of the types of documents that have been withheld as privileged."). Finally, even though the declarations submitted by the government identified different categories of documents in the DPP log, nowhere did the government argue to Judge Kim why those different categories were material to her

[1] If anything, Judge Kim may have been overly generous in finding some documents falling within the privilege. For example, although the fact/opinion distinction is not always dispositive, there are some documents that seem more factual in nature. *See, e.g.*, In Camera Submissions, p. 37 (NTPSA_USCIS_1165) (email exchange related to the number of Haitian TPS holders); In Camera Submissions, p. 41 (NTPSA_USCIS_1309) (email exchange noting that drafts were being circulated and input provided, but without including content of the drafts or input). Also, some documents are arguably not predecisional or deliberative. *See United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021) ("Documents are 'predecisional' if they were generated before the agency's final decision on the matter, and they are 'deliberative' if they were prepared to help the agency formulate its position."). For example, there is an email exchange from January 2025 which includes statements indicating that DHS was looking for rationale that the Venezuela TPS designation should be terminated. *See* In Camera Submissions, p. 97 (NTPSA_USCIS_1618). It is questionable whether this document was predecisional given that a decision appears to have essentially already been made (*i.e.*, terminate the TPS designation), nor does it seem deliberative if DHS had already formulated its position. *See Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 45 F.4th 963, 972 (D.C. Cir. 2022) ("A record is pre-decisional if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made.' And a record is deliberative if it 'reflects the give-and-take of the consultative process.'").

analysis of the DPP. *See Karnoski*, 926 F.3d at 1206 ("[I]n balancing the *Warner* factors [as to when the DPP may be overcome[2]], the district court should consider classes of documents separately when appropriate. It is not clear the district court did so in this case. The district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories."). In short, the government has not demonstrated that the bellwether documents are ***not*** representative of the other documents and has pointed to no reason why non-bellwether documents warrant an analysis that materially differs from that in which Judge Kim engaged.

Second, the government contends that Judge Kim improperly put the burden on the government to show why the DPP should not be overcome, instead of placing the burden on Plaintiffs to show why the privilege should be overcome. That is not accurate. The government has taken a statement from Judge Kim's order out of context. *See* Docket No. 184 (Order at 6) ("Defendants do not provide any analysis for balancing the [*Warner*] factors and do not explain why the Plaintiffs' need for the materials and the need for accurate fact-finding overrides Defendants' interest in nondisclosure. . . "). The statement, when read in the context of the entire paragraph, demonstrates that Judge Kim did not put the burden on the government but rather "recognized that in the face of Plaintiffs' clear delineation of need, Defendants offered nothing." Opp'n at 6; *see also* Docket No. 184 (Order at 6) ("Plaintiffs cannot obtain this evidence in any other manner, and their arguments have support in evidence. Their need for this evidence on this important topic outweighs the potential chilling effect on future discussions.").

Third, the government argues that Judge Kim disregarded Rule 26(b)(1)'s proportionality standard and demonstrated a "casual" approach to the chilling effect that production of DPP documents would have. Mot. at 3. But, as Plaintiffs point out, this Court placed limits on the

[2] *See FTC v. Warner Comm'n, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) ("The deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure. Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.").

discovery Plaintiffs sought – *e.g.*, in terms of time period and the number of custodians. Furthermore, the actual number of documents at issue is several hundred, not, *e.g.*, thousands. Hence there is no undue burden in terms of the volume of documents. As noted, the volume of documents at issue is circumscribed in large part by the limitation on scope ordered by this Court. As to the government's assertion of a chilling effect, that is a factor which informs whether the DPP should be overcome by need, rather than a part of the proportionality analysis under Rule 26(b)(2). In any event, the government's showing of chilling effect was boilerplate and, for reasons stated herein, not substantiated.

Fourth, the government points out that Judge Kim's analysis of the first *Warner* factor (relevance of the DPP documents) was tied to racial animus, but that the summary judgment motion recently filed by Plaintiffs does not seek relief based on the equal protection claims but rather the APA claims only. The government's argument lacks merit for several reasons. First, the fact that Plaintiffs are moving for summary judgment on their APA claims alone does not mean that discovery for the equal protection claim is not needed. The equal protection claims remain in the case and is subject to final adjudication. Second, even if the Court were to consider only the APA claims as a basis for current discovery, the discovery sought is still relevant to the APA claims. As Plaintiffs note, "[a]s a matter of logic, evidence of racial animus would support a finding that the challenged decisions rest on pretext, rather than fair-minded policy consideration." Opp'n at 7.

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Finally, the government contends – once again – that all discovery is inappropriate in light of the Supreme Court's order staying the postponement order issued by this Court. The government maintains that allowing discovery to proceed before the Ninth Circuit and/or Supreme Court have ruled on the jurisdictional issues is improper. This Court has already rejected this argument.

II. CONCLUSION

Accordingly, the government's motion for relief is denied.

This order disposes of Docket No. 187.

IT IS SO ORDERED.

Dated: June 12, 2025

EDWARD M. CHEN
United States District Judge